STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 10, 2002
v	No. 226722 Bay Circuit Court
CHARLES MICHAEL KENDALL, Defendant-Appellant.	LC No. 99-001231-FC

Before: Fitzgerald, P.J., and Bandstra and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit great bodily harm less than murder, MCL 750.84, and domestic violence, third offense, MCL 750.81(4). The trial court sentenced defendant to concurrent prison terms of 80 to 120 months and 16 to 24 months, respectively. Defendant appeals as of right. We affirm.

I

This case arises from a stabbing and beating suffered by defendant's girlfriend at defendant's hand. On appeal, defendant first argues that the trial court erred in permitting Officer Robert Greenleaf, who aided the investigation in this matter, to testify regarding the "purpose" of the Marine K-Bar knife used by defendant in committing the charged assault.[1] Specifically, defendant argues that such testimony requires that the witness be qualified as an expert in weaponry under MRE 702, and that a proper foundation for Greenleaf's qualifications in this regard was not laid prior to admission of this testimony. Contrary to defendant's assertion, however, no objection to Greenleaf's qualifications to offer the challenged testimony was levied at trial and this argument is, therefore, not properly preserved for our review.[2]

[1] When asked what the intended purpose of a Marine K-Bar knife is, Greenleaf responded that the weapon is "issued to Marines for hand-to-hand combat, to kill people."

[2] Although counsel for defendant objected at trial to the "purpose" of Greenleaf's testimony regarding the intended functions of the military-issue knife, Greenleaf's qualifications to offer such testimony were not raised. "An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground." *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996).

Accordingly, our review is limited to determining whether defendant has established outcome-determinative plain error. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999). We find no such error here, as it was not necessary for Greenleaf to be qualified as an expert in order to testify regarding the "purpose" of the knife.

A witness may testify to matters within his personal knowledge. MRE 602. Here, before offering the challenged testimony, Greenleaf stated on the record that, although he had been a police officer for the past twenty-four years, he had previously served in the United States Marine Corp and, at the time of trial, remained an active member of the Marine Corps Reserves – serving as a gunnery sergeant in a combat infantry unit. Greenleaf testified that he recognized the subject knife as a "K-Bar," which he indicated are issued by the Marine Corps to its combat infantry units. Greenleaf further testified that he had himself been issued such a knife by the Corps and, in fact, still carried one. Given this testimony, we conclude that the "purpose" of the particular weapon at issue was sufficiently within Greenleaf's personal knowledge to warrant admission of the challenged testimony. Moreover, contrary to defendant's assertion, such testimony should not have been excluded under MRE 403 as more prejudicial than probative. Although convicted of the lesser offense of assault with intent to do great bodily harm less than murder, defendant was tried on a charge of assault with intent to murder, MCL 750.83. The fact that the knife used to inflict the victim's wounds was specifically designed for use in mortal combat was sufficiently probative on the issue of defendant's intent in committing the charged assault to outweigh any accompanying prejudice.

II

Defendant next argues that he was denied a fair trial by the improper admission of several photographs depicting the victim's wounds. Because defendant failed to object to the admission of these photographs, our review is again for plain error affecting substantial rights. *Carines, supra*.

Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402; *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998). Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). However, even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403.

In challenging the admissibility of the subject photographs, defendant argues that these items were cumulative because several witnesses had already testified regarding the extent of the victim's injuries. Photographs, however, are not excludable from evidence simply because a witness can orally testify regarding the information contained in the photographs. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909, modified 450 Mich 1212 (1995). Where relevant and probative, photographs may be used to corroborate or further explain witness testimony. *Id*. Moreover, although defendant is correct that photographs calculated merely to arouse the sympathies or prejudices of the jury should not be admitted, where a photograph is "otherwise admissible for a proper purpose, it is not rendered inadmissible merely because it brings vividly to the jurors the details of a gruesome or shocking accident or crime." *Id*., quoting *People v*

Eddington, 387 Mich 551, 562-563; 198 NW2d 297 (1972). The issue is whether the photographs are "evidence of 'any fact that is of consequence to the determination' of the defendant's guilt and whether the photographs made the existence of certain facts more or less probable." *Mills*, *supra* at 68.

In this case, as an element of the offense of assault with intent to commit murder, defendant's intent in committing the charge crime was a fact of consequence to the determination of defendant's guilt. See MCL 750.83; see also *Mills*, *supra* at 69-71. The subject photographs, which depicted the location and severity of the victim's wounds in a manner not readily apparent from the testimony, were probative of such intent. *Mills*, *supra* at 71-72. While these depictions of the victim may have also been prejudicial, we note that "[a]ll evidence offered by the parties is 'prejudicial' to some extent," but that it is only when the probative value of such evidence is substantially outweighed by the danger of unfair prejudice that evidence is to be excluded. *Id*. at 76; MRE 403. Here, given the strength with which the photographs bore on the issue of intent, we conclude that the probative value of these items was not substantially outweighed by the danger of unfair prejudice to defendant. Accordingly, their admission was not plain error requiring reversal.[3]

III

Defendant next argues that statements made by him to police shortly after his arrest were erroneously admitted as evidence in contravention of his state and federal constitutional rights against self-incrimination. US Const, Am V; Const 1963, art 1, § 17. Because defendant failed to bring a motion for a *Walker*[4] hearing and did not object to the admission of these statements at trial, this issue is not preserved. *People v Snider*, 239 Mich App 393, 417; 608 NW2d 502 (2000). We therefore review this claim for plain error that affected defendant's substantial rights. *Carines*, *supra*.

Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his right against self-incrimination. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *People v Garwood*, 205 Mich App 553, 555-556; 517 NW2d 843 (1994). To be valid, a waiver "must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception," and it "must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v Burbine*, 475 US 412, 421; 106 S Ct 1135; 89 L Ed 2d 410 (1986).

Here, defendant argues that he was too intoxicated to voluntarily waive his rights and give the challenged statements. We disagree. Although advanced intoxication may preclude the effective waiver of *Miranda* rights, *People v Davis*, 102 Mich App 403, 410; 301 NW2d 871 (1980), the fact that a person was intoxicated is not dispositive of the issue of voluntariness. *People v Leighty*, 161 Mich App 565, 571; 411 NW2d 778 (1987). Rather, voluntariness

[3] Because we conclude that the challenged photographs were admissible, we reject defendant's contention that the trial court should have sua sponte disallowed their admission.

[4] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

depends on the totality of the circumstances surrounding the confession. See *Moran*, *supra* at 421. In this case, several police witnesses testified that defendant did not appear intoxicated at the time that he made the statements at issue. In addition, the record indicates that defendant was not threatened or otherwise coerced into making the statements, but rather that he offered to "give [his] side of the story." Under these circumstances, we do not conclude that defendant's statements were admitted in error.

In reaching this conclusion, we reject defendant's claim that his statements should have been excluded because he was not advised of his *Miranda* rights. The arresting officer testified at trial that defendant was read his *Miranda* rights when he was placed in the patrol car at the scene, and that defendant indicated that he understood these rights. Consistent with this testimony, defendant, in his statement to police, admitted that an officer at the scene had read him his *Miranda* rights. Contrary to defendant's assertion, his waiver of these rights need not have been written to be valid, see e.g., *People v Harris*, 110 Mich App 636, 653; 313 NW2d 354 (1981), nor were the police required to readvise him of such rights upon questioning, *People v Littlejohn*, 197 Mich App 220, 223; 495 NW2d 171 (1992). Accordingly, defendant has failed to establish that the trial court plainly erred in admitting the challenged statements as evidence at trial.

IV

Defendant next argues that the evidence at trial was insufficient to support his conviction of assault with intent to do great bodily harm. Again, we disagree.

When determining whether sufficient evidence has been presented to sustain a conviction, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Godbold*, 230 Mich App 508, 522; 585 NW2d 13 (1998). We conclude that the evidence, when viewed in such a light, was sufficient to support defendant's conviction.

"The elements of assault with intent to do great bodily harm less than murder are: (1) an attempt or offer with force or violence to do corporal hurt to another, (2) coupled with an intent to do great bodily harm less than murder." *People v Pena*, 224 Mich App 650, 659; 569 NW2d 871 (1997). With respect to the latter of these elements, defendant asserts that because a preliminary breath test administered to defendant shortly after his arrest indicated that his blood alcohol level was 0.14 percent, a rational trier of fact could not have found that he possessed the requisite intent to sustain his conviction. However, voluntary intoxication will negate the specific intent element of a charged crime only if the degree of intoxication is so great as to render the accused incapable of entertaining the requisite intent. *Mills*, *supra* at 82; *People v Gomez*, 229 Mich App 329, 332; 581 NW2d 289 (1998). Viewed in a light most favorable to the prosecution, we conclude that there was sufficient evidence to support the jury in finding that, despite his intoxication, defendant was sufficiently lucid to harbor the requisite intent.

The victim testified that immediately before being stabbed, defendant, apparently noticing the flash of police lights outside the home, stated, "So you called 'em, and if I'm goin' to jail, then I'm gonna go for something." In his statement to police, defendant also stated that he told the victim that he was tired of her always beating on him and that if she did not stop the

current beating he was going to stab her, and that after the assault he just sat in bed because, "[he] knew [he] was fucked." Given these statements, a rational juror would be justified in concluding that defendant was not intoxicated to the point at which he was incapable of forming the intent to commit the charged crime. Indeed, defendant's cognitive skills were sufficiently intact to conclude, albeit erroneously, that the police presence outside his home was the result of the victim having called them, to articulate his reasoning for stabbing the victim, and to realize the gravity of his actions after having stabbed her. Furthermore, although several police officers who had contact with defendant on the night of the assault did notice signs of intoxication, all testified that he was able to comprehend and follow instructions after his arrest.

V

Defendant next argues that his trial counsel was ineffective because he failed to object to the admission of the photographs depicting the victim's injuries or to raise the defense of intoxication. Because defendant failed to move for either a *Ginther*[5] hearing or a new trial based on ineffective assistance of counsel, our review of this claim is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).[6]

To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Inasmuch as we have already concluded that admission of the photographs depicting the victim's injuries was proper, counsel's failure to object to their admission did not constitute ineffective assistance of counsel. Defense counsel was not required to raise a meritless objection. See *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

We similarly reject defendant's claim that his trial counsel was ineffective for failing to argue and request instruction on the defense of intoxication. As previously discussed, although there was evidence to indicate that defendant was intoxicated at the time of the assault, there was also evidence indicating that defendant was not so intoxicated as to be incapable of forming the requisite intent. In his closing argument, trial counsel argued that there was insufficient evidence to support a conviction on the charged offense of assault with intent to commit murder, and that the appropriate conviction was that of the lesser-included offense of assault with intent to do great bodily harm less than murder. It was clearly counsel's trial strategy to concede guilt on the lesser-included charge of assault with intent to do great bodily harm less than murder and hopefully avoid a conviction on the higher charge of assault with intent to commit murder. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*,

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[5] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

[6] Defendant argues that we should remand for a *Ginther* hearing. However, we decline to do so because defendant failed to bring a timely motion for remand pursuant to MCR 7.211(C)(1).

235 Mich App 429, 445; 597 NW2d 843 (1999). Moreover, a lawyer does not render ineffective assistance by conceding certain points at trial, including guilt of a lesser offense. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994). Therefore, we conclude that defendant was not denied effective assistance of counsel when his trial counsel decided not to present an intoxication defense.

Defendant also argues his trial counsel was ineffective for failing to move for a directed verdict, asserting that his intoxication negated the specific intent necessary to support assault with intent to do great bodily harm less than murder. However, as previously discussed, there was sufficient evidence to support a rational trier of fact in concluding that defendant harbored the requisite intent and a directed verdict on that ground would therefore not have been proper. See *People v Vincent,* 455 Mich 110, 121; 565 NW2d 629 (1997). Accordingly, defendant was not denied effective assistance because his trial counsel did not move for a directed verdict. *Gist, supra*.

VI

Finally, defendant argues that this seventy-month minimum sentence, imposed outside of the applicable guideline range, is disproportionate. We do not conclude that remand for resentencing is warranted.

Under the legislative sentencing guidelines applicable to this case, a remand for resentencing is warranted if the trial court did not have a substantial and compelling reason for departing from the appropriate sentence range. MCL 769.34(11). We review the trial court's determination that a particular factor warranting departure existed for clear error. *People v Babcock*, 244 Mich App 64, 75-76; 624 NW2d 479 (2000)(*Babcock I*). A substantial and compelling reason must be "objective and verifiable" and we review the trial court's determination in this regard as a matter of law. *Id*. at 76. A trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence is reviewed for an abuse of discretion. *Id*.[7]

The trial court here noted that, while the scoring of the prior record variables took into account defendant's prior domestic violence convictions, they did not take into account the fact that the same victim was involved and that the prior offenses all occurred within a short time before the instant offense. The trial court further noted that many of defendant's prior offenses, like the instant offense, involved excessive drinking, a fact not accounted for in the guidelines. The trial court further noted that the 150 points scored against defendant under the offense variables was far in excess of the maximum recognized by the sentencing grid.

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[7] Although we acknowledge that this Court, in *People v Babcock (After Remand)*, ___ Mich App ___, ___ n 3; ___ NW2d ___ (2002)(*Babcock II*), recently suggested that the appropriate standard of appellate review of a trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence is de novo, we are obligated to follow the holding in *Babcock I*. See MCR 7.215(I)(1).

Defendant does not challenge the veracity of any of these factors and they are clearly all objective and verifiable. Our review is thus limited to determining whether the trial court's decision that they warranted a departure from the guidelines was an abuse of discretion. *Id*. at 76. We do not conclude that the judge's decision in this regard was "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will" and therefore conclude that no abuse of discretion occurred. *Id*., quoting *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).

Further, we recognize that the substantial and compelling factors relied upon by the trial court must justify the particular departure at issue. *People v Hegwood*, 465 Mich 432, 437, n 10; 636 NW2d 127 (2001). As with the determination whether any departure is warranted, we conclude that the trial court's determination in this regard is reviewed for an abuse of discretion. See *Babcock I, supra* at 76. Defendant could have been sentenced to a minimum term of sixty-seven months within the applicable guideline range. The trial court imposed a minimum sentence of eighty months, which included a thirteen-month upward departure. In light of the fact that the trial court articulated a number of substantial and compelling reasons for the departure and also of the fact that the departure here resulted in a departure of less than twenty percent of that authorized by the guideline range, we do not conclude that the trial court abused its discretion by imposing a departure sentence of too great a length.

We affirm.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra
/s/ Kirsten Frank Kelly